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ON PAGE A-21

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Secrecy After the Snepp Case

The legal principle underlying the case of the *United States v. Frank Snepp* is a simple one; but it may well be the glue that preserves our intelligence agencies from the ravages of a purported absolutism, described under the euphemism of "the public's right to know."

Continued disclosures by ex-agent Philip Agee, books by Snepp and others, had alarmed intelligence officials in the United States and abroad, American and allied. The CIA and related American intelligence agencies were more and more viewed as existing in an unstable environment.

Now that the Supreme Court has sustained the principle that the CIA may contractually require its employees to clear any publication concerning the agency, careful consideration should be focused on how the government is to operate with this right.

Clearly, the government's successful action against Frank Snepp, the ex-CIA agent who had signed at least two agreements with the CIA to submit matters proposed for publication concerning the agency for clearance—and who had represented personally to Adm. Stansfield Turner that he would—is one of the more significant recent steps to buttress our nation's intelligence capacity. The rush to disclose by ex-employees and officials had reverberated throughout the international intelligence community. Our longtime allies seriously questioned our ability to maintain their confidence and trust, and sources questioned our ability to protect them. Our own operatives in the field were endangered by the disclosures of their ex-colleagues.

We are beyond the day of Le Carré-like cloak and daggers in furnishing adequate and timely intelligence to the president and his advisers for responding to the social, political and economic complexities of today's world. Protecting our intelligence secrets, and the sources and methods by which we derive them, is the cornerstone of an effective CIA.

But in embracing the principle of the Snepp case, there is no lessening of our nation's resolve or ability to channel the activities of our intelligence agencies in a proper and lawful manner, to live within those safeguards and established bounds that prevent proscribed activities both at home and abroad.

In a significant article on the First Amendment and a responsible press, which caused much comment on these pages (September 5, 1977), the late Alan Barth, a discerning First Amendment advocate, wrote:

"There are many matters, it must be recognized, that governments—including the governments of democracies—ought and must keep secret. . . . But the responsibility for guarding them is a government responsibility. It is not a responsibility of the press. Nor should the press be considered in any sense a partner or agent of the government in discharging this responsibility."

The eminent British jurist and scholar Lord Scarman put it well when he observed that while freedom of the press, including the right of the public to be informed, is a transcendent right, it is a right subject in some instances and to some extent to the security of the nation, the security of the individual, property rights, the right of privacy and the right of the individual to reputation.

In foreign intelligence and counterintelligence there is no danger of covering up wrongdoing if one wishes to report it. Specifically, there are internal agency and executive branch mechanisms for disclosures, including taking the matter to the intelligence oversight board or to the president himself. In addition, our shared system of checks and balances between the executive and legislative branches provides—through the congressional oversight function of the Senate and House intelligence committees—additional means for the "whistle blowers'" redress—all without public disclosure necessarily of those matters that should be protected.

Beyond a possible criminal sanction in a clearly definable area, such as publishing the names of CIA agents abroad, no statutory scheme, given the limitations in definition, can be as effective, fair or limited as the simple contractual preclearance requirement. Nor is the argument persuasive that the contract should distinguish between classified and nonclassified data. The relevance of whether the matter is classified, nonclassified or classifiable is better left to the agency review process. Moreover, this across-the-board formula facilitates application of the clearance requirement to *all* levels of the agency, as it should, whether the proposed author is a former head of the agency or the lowest-level agent.

Now that the contract principle is firmly in place, the government's own responsibility is to see that such contracts are carefully and narrowly drafted to ensure the reasonableness of the basic contract in relation to the job and trust imposed, as well as to ensure the reasonableness of the agency's response. This importantly includes the speed of the review process and the basic fairness of the review to exclude only from publication those matters that are and should be truly secrets. For the most part, the greatest burden is on the reviewing agency to ensure this. But because of the understandable reluctance of the courts to undertake a review of the fairness of the agency review process, not to mention the outright difficulty, consideration should be given to the creation of a special review panel inside the executive branch, but apart from the agency itself, to review any appeals of the employee from the agency's own review. This addresses the important concern of keeping secret those things that should be, and not necessarily that which is merely embarrassing or disconcerting. Resort to the courts as is presently the case could then be had

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The contractual principle of the Snepp case should be limited to those engaged in foreign intelligence and counterintelligence. That many governmental agencies employ persons who hold positions of trust and confidentiality does not sufficiently distinguish the very special character and national needs of our foreign intelligence operations.

The issues in the Snepp case were not those of the First Amendment, but rather whether the government might exercise its responsibilities in foreign intelligence by conditioning the employment of those who seek to enter into its employ on a publication-preclearance process. The courts, on every level, found such a condition to be valid and reasonable. The required forfeiture of profits was no more than an application of the ancient maxim that one should not profit from his own wrongdoing. The legal principles involved and the lack of disputed facts rendered the case so simple as to warrant summary disposition in the Supreme Court. The nation is the better for the decision.

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